

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2004-000289-001 DT

07/20/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT  
P. M. Espinoza  
Deputy

FILED:\_\_\_\_\_

MIKE FLOOD

NOEL J HEBETS

v.

SCOTT SAVILLE (001)  
ELONICA SAVILLE (001)

SCOTT SAVILLE  
PO BOX 47060  
PHOENIX AZ 85068  
ELONICA SAVILLE  
PO BOX 47060  
PHOENIX AZ 85068

CAREFREE MUNICIPAL COURT  
REMAND DESK-LCA-CCC

MINUTE ENTRY

This Court has jurisdiction of this appeal from an Order Continuing an Injunction Against Harassment pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This case has been under advisement since its assignment on May 25, 2004. This decision is made within 60 days as required by Rule 9.9, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record of the proceedings from the Cave Creek City Court, and the memoranda submitted by the parties.

Appellees Mike and Jackie Flood obtained an Injunction Against Harassment *ex parte* from the Cave Creek City Court against Appellants, Scott and Elonica Saville. Appellants requested a hearing which was held before the court on January 21, 2004. At the conclusion of the hearing, the trial court continued the Injunctions Against Harassment in full force and effect.

Appellants raise several issues on appeal, most of which are of no consequence or irrelevant. However, Appellants contend that the trial court erred in permitting the attorney for Appellees, Noel Hebets, to testify at the hearing, and then did not give Appellants the opportunity to cross-examine Hebets. As a preliminary matter, this Court notes that the Arizona Docket Code 512

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2004-000289-001 DT

07/20/2004

Rules of Professional Conduct preclude a lawyer from testifying in a proceeding where he or she acts as the attorney, except under unusual circumstances. ER 3.7, Arizona Rules of Professional Conduct, provides in part:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) The testimony relates to an uncontested issue; (2) The testimony relates to the nature and value of legal services rendered in the case; or (3) Disqualification of the lawyer would work substantial hardship on the client.

It does not appear that Mr. Hebets' testimony related to an uncontested issue, nor did it concern the value of legal services rendered in the case. Further, the record does not indicate that disqualification of the lawyer as an advocate would have worked a substantial hardship on the client. In fact, there is no record at all concerning the reasons why the trial judge permitted attorney Hebets to testify as a witness. Clearly, this was error.

The second part of this issue is more troubling. The record clearly reflects that the trial judge permitted attorney Hebets to testify, and then offered no opportunity for the opposing parties to cross-examine him. A hearing on an Injunction Against Harassment is an important proceeding entitling all parties to the protections of procedural due process. Article II, Section 4 of Arizona's Constitution provides for the identical due process rights that are embodied in the Fourteenth Amendment to the United States Constitution. Our fundamental rights of due process include the right to a fair trial, the right to present witnesses' testimony and exhibits in support one's case, and the right to confront and cross-examine witnesses. The confrontation clause of the Sixth Amendment to the United States Constitution has been recognized as guaranteeing a *fundamental right*, when it was incorporated into the Fourteenth Amendment to the United States Constitution.<sup>1</sup>

Rarely is a fundamental error harmless. The Arizona Supreme Court has previously defined "fundamental error" as an error that "reaches the foundation of the case or takes from ... (a party) a right essential to his defense, or is an error of such dimensions that it cannot be said it is possible for a ...(party) to have had a fair trial."<sup>2</sup> The absence of an opportunity for proper confrontation and cross-examination calls into question the ultimate integrity of the fact finding process itself.<sup>3</sup> Permitting the lawyer for Appellees to testify without offering the opportunity for confrontation and cross-examination to Appellants violates the basic concept of a fair trial. Denial of the fundamental due process rights of cross-examination and confrontation merits a reversal.<sup>4</sup>

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<sup>1</sup> Pointer v. Texas, 280 US 400, 85 S.Ct. 1065 (1965).

<sup>2</sup> State v. King, 158 Ariz. 419, 424, 763 P.2d 239, 244 (1988).

<sup>3</sup> Ohio v. Roberts, 448 US 56, 100 S.Ct. 2531, 65 L.Ed.2d. 597 (1980).

<sup>4</sup> Pointer v. Texas, *supra*.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2004-000289-001 DT

07/20/2004

IT IS THEREORE ORDERED reversing and vacating the order of the Cave Creek City Court continuing the Injunctions Against Harassment in full force and effect.

IT IS FURTHER ORDERED remanding this matter back to the Cave Creek City Court for a new hearing on Appellees Petitions for Injunctions Against Harassment.

/ s / HONORABLE MICHAEL D. JONES

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JUDICIAL OFFICER OF THE SUPERIOR COURT